

1
2
3
4
5
6
7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 ME2 PRODUCTIONS, INC,

11 Plaintiff,

12 v.

13 DYLAN BOGERT, *et al.*,

14 Defendants.
15

Case No. C17-0182RSL

ORDER GRANTING IN PART ME2's
MOTIONS FOR DEFAULT
JUDGMENT

16
17 **I. INTRODUCTION**

18 This matter comes before the Court on plaintiff ME2 Productions, Inc.'s motions
19 for default judgment against defendants Dylan Bogert (Dkt. #81), Barbara Whalen (Dkt.
20 #83), Nik Revenko (Dkt. #84), Murad Baluch (Dkt. #86), and Joey Ordan (Dkt. #88).
21

22 Having reviewed the relevant briefing and the remainder of the record, ME2's motions
23 for default judgment are GRANTED IN PART and DENIED IN PART.
24

25 **II. BACKGROUND**

26 The five motions for default judgment that are the subject of this Order are just a
27 portion of the more than eighty default judgment motions ME2 has filed in nineteen
28

1 cases before this Court.¹ All of the cases assert the same causes of action. ME2 alleges
2 that hundreds of individual defendants unlawfully infringed its exclusive copyright to
3 the motion picture *Mechanic: Resurrection*, which it developed and produced, by
4 copying and distributing the film over the Internet through a peer-to-peer network using
5 the BitTorrent protocol. Plaintiff served internet service providers (“ISP”s) with
6 subpoenas in order to identify the alleged infringers. Amended complaints identifying
7 defendants by name were subsequently filed.
8
9

10 Defendants Bogert, Whalen, Revenko, Baluch, and Ordan (collectively
11 “Defendants”) are named in the same complaint because, given the unique identifier
12 associated with a particular digital copy of *Mechanic: Resurrection* and the timeframe
13 in which the internet protocol address associated with each Defendant accessed that
14 digital copy, ME2 alleges the named Defendants were all part of the same “swarm” of
15 users that reproduced, distributed, displayed, and/or performed the copyrighted work.
16 According to ME2, Defendants directly or indirectly shared, downloaded, and
17 distributed a single unique copy of *Mechanic: Resurrection* that had been seeded to the
18 torrent network at some undefined point in the past.
19
20
21
22
23
24

25 ¹ See Case Nos. C16-1881RSL, C16-1882RSL, C16-1950RSL, C16-1953RSL, C16-1955RSL, C17-
26 0099RSL, C17-0100RSL, C17-0181RSL, C17-0182RSL, C17-0246RSL, C17-0248RSL, C17-0250RSL,
27 C17-0465RSL, C17-0466RSL, C17-0783RSL, C17-0893RSL, C17-1077RSL, C17-1220RSL, and C17-
28 1221RSL.

Two other cases, C16-1776RSL and C16-1778RSL were dismissed for failure to timely served and refiled as C17-0246RSL and C17-0248RSL, respectively. A final case, C17-694RSL, was closed in August 2017.

1 Defendants did not respond to ME2's complaint. The Clerk of Court therefore
2 entered default against Defendants at ME2's request. See Dkts. ##54-57 and #66. ME2
3 now seeks judgment against each Defendant.

4 III. DISCUSSION

5
6 Federal Rule of Civil Procedure 55(b) authorizes a court to grant default
7 judgment. Prior to entering judgment in defendant's absence, the Court must determine
8 whether the allegations of a plaintiff's complaint establish his or her liability. Eitel v.
9 McCool, 782 F.2d 1470, 1471-72 (9th Cir. 1986). The court must accept all well-pled
10 allegations of the complaint as established fact, except allegations related to the amount
11 of damages. TeleVideo Sys., Inc. v. Heidenthal, 826 F.2d 915, 917-18 (9th Cir. 1987).
12 Where the alleged facts establish a defendant's liability, the court has discretion, not an
13 obligation, to enter default judgment. Alan Neuman Productions, Inc. v. Albright, 862
14 F.2d 1388, 1392 (9th Cir. 1988). If plaintiff seeks an award of damages, it must provide
15 the Court with evidence to establish the amount. TeleVideo Sys., 826 F.2d at 917-18.

16 A. Liability Determination.

17
18 The allegations in ME2's complaint establish Defendants' liability for direct
19 copyright infringement. To establish direct infringement, ME2 must demonstrate
20 ownership of a valid copyright and that Defendants copied "constituent elements of the
21 work that are original." L.A. Printex Indus., Inc. v. Aeropostale, Inc., 676 F.3d 841, 846
22 (9th Cir. 2012) (quoting Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361
23 (1991)). Here, ME2 alleges it owns the exclusive copyright to the motion picture
24 *Mechanic: Resurrection* and that Defendants participated in a "swarm" to unlawfully
25
26
27
28

1 copy and/or distribute the same unique copy of *Mechanic: Resurrection*. These
2 allegations were established by entry of default against Defendants. Accordingly, ME2
3 has established Defendants' liability for direct copyright infringement.

4
5 B. Default Judgment is Warranted.

6 Having established liability, plaintiff must also show that default judgment is
7 warranted. Courts often apply the factors listed in Eitel, 782 F.2d at 1471-72, to make
8 this determination. Those factors are:

9
10 “(1) the possibility of prejudice to the plaintiff, (2) the merits of plaintiff's
11 substantive claim, (3) the sufficiency of the complaint, (4) the sum of
12 money at stake in the action; (5) the possibility of a dispute concerning
13 material facts; (6) whether the default was due to excusable neglect, and
14 (7) the strong policy underlying the Federal Rules of Civil Procedure
15 favoring decisions on the merits.”

16 The majority of these factors weigh in favor of granting default judgment against
17 Defendants. ME2 may be prejudiced without the entry of default judgment as it will be
18 left without a legal remedy. See Landstar Ranger, Inc. v. Parth Enters., Inc., 725 F.
19 Supp.2d 916, 920 (C.D. Cal. 2010). ME2's complaint sufficiently alleges a claim of
20 direct copyright infringement, and Defendants did not present any evidence or argument
21 to the contrary. Additionally, the Court finds there is a low probability that default against
22 Defendants was due to excusable neglect: Defendants were given ample opportunity to
23 respond to the filings in this matter between the time they were served with ME2's
24 complaint and when ME2 filed its motions for default judgment. Finally, although there
25 is a strong policy favoring decisions on the merits, the Court may consider Defendants'
26
27
28

1 failure to respond to ME2's requests for default and default judgment as admissions that
2 the motions have merit. LCR 7(b)(2).

3 The Court acknowledges that a dispute concerning the material facts alleged by
4 ME2, including the identity of the alleged infringers, could arise in this case. The Court
5 also acknowledges that the amount at stake may be significant depending on the means
6 of each Defendant. ME2 seeks enhanced statutory damages in the amount of at least
7 \$1,500 along with attorneys' fees in excess of \$1,700 and costs in excess of \$140 from
8 each individual Defendant. Notwithstanding these considerations, the Eitel factors
9 weigh in favor of granting default judgment against Defendants.

10
11
12 C. Appropriate Relief.

13
14 ME2 requests entry of a default judgment against each Defendant providing the
15 following three categories of relief: (1) permanent injunctive relief; (2) statutory
16 damages; and (3) attorney's fees and costs. Each category is discussed below.

17
18 i. *Permanent Injunctive Relief*

19 Permanent injunctive relief is appropriate. Section 502(a) of Title 17 of the
20 United States Code allows courts to "grant temporary and final injunctions on such
21 terms as it may deem reasonable to prevent or restrain infringement of a copyright." As
22 part of a default judgment, courts may also order the destruction of all copies of a work
23 made or used in violation of a copyright owner's exclusive rights. 17 U.S.C. § 503(b).
24 Given the nature of the BitTorrent protocol and Defendants' participation therein, the
25 Court finds Defendants possess the means to continue infringing in the future. MAI Sys.
26 Corp. v. Peak Comput., Inc., 991 F.2d 511, 520 (9th Cir. 1993) (granting permanent
27
28

1 injunction where “liability has been established and there is a threat of continuing
2 violations.”). Consequently, the Court will issue a permanent injunction enjoining
3 Defendants from infringing ME2’s rights in *Mechanic: Resurrection* and directing them
4 to destroy all unauthorized copies of *Mechanic: Resurrection*.

6 ii. *Statutory Damages*

7 Plaintiff requests an award of statutory damages in the amount of at least \$1,500
8 against each Defendant for his or her participation in the BitTorrent swarm that resulted
9 in the unauthorized download and/or distribution of the seed file containing *Mechanic:*
10 *Resurrection*. Although the actual economic damages associated with a lost video rental
11 are likely minimal, plaintiff correctly points out that Congress has authorized statutory
12 damages in significant amounts to compensate for difficult-to-prove downstream losses
13 and to deter future infringement. Los Angeles News Serv. v. Reuters Int’l, Ltd., 149
14 F.3d 987, 996 (9th Cir. 1998) (quoting Peer Int’l Corp. v. Pausa Records, Inc., 909 F.2d
15 1332, 1336 (9th Cir. 1990)). Under 17 U.S.C. § 504(c)(1), the Court may award
16 statutory damages “for all infringements involved in the action, with respect to any one
17 work, . . . for which any two or more infringers are liable jointly and severally, in a sum
18 of not less than \$750 or more than \$30,000 as the court considers just.” The Court has
19 wide discretion when determining the amount of statutory damages and takes into
20 consideration the amount of money requested in relation to the seriousness of the
21 defendant’s conduct, whether large sums of money are involved, and whether “the
22 recovery sought is proportional to the harm caused by defendant’s conduct.” Curtis v.
23
24
25
26
27
28

1 Illumination Arts, Inc., 33 F. Supp.3d 1200, 1212 (W.D. Wash. 2014) (citing Landstar,
2 725 F. Supp. 2d at 921).

3 Copyright violations come in all shapes and sizes, from the unauthorized copying
4 of a Halloween word puzzle for a child's party to the unauthorized manufacture and sale
5 of millions of bootleg copies of a new release. While Defendants' alleged copyright
6 violation is of concern in that it represents a theft of intellectual property, it is a
7 relatively minor infraction causing relatively minor injury. ME2 has not shown that any
8 of the Defendants is responsible for the "seed" file that made ME2's copyrighted work
9 available on the BitTorrent network, nor has ME2 presented evidence that Defendants
10 profited from the infringement in any way. Given the range of statutory damages
11 specified in the Copyright Act, the Court finds that an award of \$750 for the swarm-
12 related infringements involved in this action is appropriate. Each of the Defendants is
13 jointly and severally liable for this amount.

14 This award is in line with the awards made by other courts in the Ninth Circuit
15 and appears adequate to deter Defendants from infringing on plaintiff's copyright in the
16 future.² Plaintiff argues that a significantly higher award is necessary to force people
17 like Defendants to appear and participate in these BitTorrent cases. Plaintiff apparently
18 wants the Court to raise the statutory damage award to an amount that is at or above the
19 anticipated costs of defending this action. A defendant may, however, decide that

20 ² ME2 has presented no evidence that Defendants will not be dissuaded from infringing in the future. The
21 judgment entered in this case, including statutory damages, attorney's fees, and costs, may be recovered
22 by garnishing Defendants' wages and/or seizing and selling their non-exempt property. This is a steep
23 penalty for having been too lazy to go to the local Redbox or too cheap to pay a few dollars for an
24 authorized download. Plaintiff offers no evidence to support its contention that personal liability for a
25 judgment in excess of \$500 is of no consequence to the judgment debtor.

1 conceding liability through default is the best course of action given the nature of the
2 claims and the available defenses. The “punishment” for that choice is the entry of
3 default judgment and an award of damages under the governing standards. As discussed
4 above, those standards lead to the conclusion that the minimum statutory penalty should
5 apply in this case. Plaintiff offers no support for the proposition that participation in
6 federal litigation should be compelled by imposing draconian penalties that are out of
7 proportion to the harm caused by Defendants’ actions or any benefits derived therefrom.
8
9 Statutory damages are not intended to serve as a windfall to plaintiffs and will not be
10 used to provide such a windfall here.
11

12 The Court will award ME2 \$750 in statutory damages for the infringements
13 involved in this action, for which defendants are jointly and severally liable.
14

15 iii. *Attorneys’ Fees and Costs*

16 Finally, ME2 asks the Court to award between \$1,470.00 and \$1,750.00 in
17 attorneys’ fees and between \$142.00 and \$152.00 in costs against each Defendant in this
18 matter. Pursuant to 17 U.S.C. § 505, the Court “in its discretion may allow the recovery
19 of full costs by or against any party,” and “may also award a reasonable attorney’s fee
20 to the prevailing party as part of the costs.”
21
22

23 The Court agrees that ME2 should be awarded attorneys’ fees. Courts consider
24 several factors, including “(1) the degree of success obtained, (2) frivolousness,
25 (3) motivation, (4) objective unreasonableness (legal and factual), and (5) the need to
26 advance considerations of compensation and deterrence,” when making attorneys’ fee
27 determinations under the Copyright Act. Smith v. Jackson, 84 F.3d 1213, 1221 (9th Cir.
28

1 1996) (citing Jackson v. Axton, 25 F.3d 884, 890 (9th Cir. 1994)). Because ME2 has
2 succeeded on its non-frivolous direct infringement claim³ and because an award would
3 advance considerations of compensation and deterrence, ME2 is entitled to attorneys’
4 fees.
5

6 However, despite counsel’s efforts to allocate the fees and costs to each
7 individual defendant, the overall fee request is problematic. Courts determine the
8 amount of a fee award by determining a “lodestar figure,” which is obtained by
9 multiplying the number of hours reasonably expended on a matter by a reasonable
10 hourly rate. Intel Corp. v. Terabyte Int’l, Inc., 6 F.3d 614, 622 (9th Cir. 1993). Courts
11 may then adjust the lodestar with reference to factors set forth in Kerr v. Screen Extras
12 Guild, Inc., 526 F.2d 67, 69-70 (9th Cir. 1975), to the extent those factors are not
13 already subsumed in counsel’s hourly rates or the number of hours expended on the
14 litigation. The relevant Kerr factors here are: (1) the time and labor required; (2) the
15 novelty and difficulty of the questions; and (3) the skill requisite to perform the legal
16 services properly.
17
18
19

20
21 1. *Reasonableness of Rate Requested*

22 In the Ninth Circuit, the determination of a reasonable hourly rate “is not made
23 by reference to rates actually charged the prevailing party.” Chalmers v. City of Los
24 Angeles, 796 F.2d 1205, 1210 (9th Cir. 1986). Instead, the reasonable hourly rate is
25 determined with reference to the prevailing rates charged by attorneys of comparable
26
27

28 ³ Despite the entry of default, the Court specifically declines to enter judgment in plaintiff’s favor on its indirect and contributory infringement claims.

1 skill and experience in the relevant community. Blum v. Stenson, 465 U.S. 886, 895
2 (1984). “Generally, when determining a reasonable hourly rate, the relevant community
3 is the forum in which the district court sits.” Camacho v. Bridgeport Fin., Inc., 523 F.3d
4 973, 979 (9th Cir. 2008). Courts may also consider “rate determinations in other cases,
5 particularly those setting a rate for the plaintiffs’ attorney” as “satisfactory evidence of
6 the prevailing market rate.” United Steelworkers of Am. v. Phelps Dodge Corp., 896
7 F.2d 403, 407 (9th Cir. 1990).
8
9

10 Identifying counsel’s hourly rate is more challenging than it should be. His
11 hourly rate for “normal” intellectual property cases is now \$545/hour, but he has agreed
12 to a reduced rate of \$350/hour in this case. Dkt. #82 at ¶7. In a similar BitTorrent matter
13 involving another copyright holder, counsel stated that his reduced rate was \$450/hour
14 (LHF Prods., Inc. v. Acosta, C16-1175RSM, Dkt. #71 at ¶7), which is the rate he posits
15 is “reasonable and warranted in the Seattle area” in this case (Dkt. #82 at ¶9). The Court
16 assumes, based on the fee calculation charts set forth in counsel’s declarations, that he
17 seeks an hourly rate of \$350 in this case. This hourly rate is generally within the norm
18 for BitTorrent cases in this district and is a reasonable rate for the type of formulaic
19 legal work performed in these matters.
20
21
22

23 *2. Reasonableness of Hours Requested*

24 Turning to the reasonableness of the hours requested, plaintiff has the burden of
25 documenting the hours expended on this matter and establishing their reasonableness.
26 Hensley v. Eckerhart, 461 U.S. 424, 437 (1983). The Court will exclude hours that are
27 “excessive, redundant, or otherwise unnecessary” and therefore not reasonably
28

expended. *Id.* at 434. Counsel has attempted to calculate the hours spent in connection with ME2's claims against each individual Defendant by dividing the total number of hours spent on collective efforts by the total number of defendants at the time the action was taken. Time spent working solely in pursuit of claims against an individual are allocated wholly to that individual. Dkt. #82 at ¶10. Taking Bogert as an example, counsel seeks compensation for the following activities:

Activity	Attorney Time	Legal Assistant Time
Review evidence of BitTorrent activity giving rise to potential claims	.4 hours	
Prepare complaint and supporting exhibits	.4 hours	
Prepare and file motion to expedite discovery	.4 hours	
Communicate with client	.1 hours	
Review Court orders	.1 hours	
Prepare subpoena and letter to ISPs	.1 hours	.3 hours
Review ISP response and prepare communications with Defendant	.2 hours	.4 hours
Review Defendant's "status and history"	.3 hours	
Prepare amended complaint and review	≈ .5 hours	
Prepare, review, and file waivers and/or summons	≈ .3 hours	.9 hours
Review file	≈ .2 hours	
Prepare and file motion for default	≈ .2 hours	
Prepare and file motion for default judgment	1 hour	
Total:	4.2 hours	1.6 hours

These seemingly modest time expenditures mask the reality of counsel's fee request.

Until recently, the BitTorrent cases filed in this district all proceeded in a similar manner.⁴ The original complaints list Doe defendants, identified only by IP addresses,

⁴ The Honorable Thomas S. Zilly has required certain additional disclosures or proffers in BitTorrent cases pending before him. See *Venice PI, LLC v. O'Leary*, C17-0988TSZ, Dkt. # 32.

1 and allege infringement of the client's exclusive rights in a specified motion picture.
2 Groups of Doe defendants are named in the same complaint because they allegedly
3 infringed the same digital copy of the copyrighted material by participating in the same
4 BitTorrent "swarm." The nearly identical complaints are accompanied by nearly
5 identical motions for expedited discovery. Once the Court grants leave to conduct
6 expedited discovery, subpoenas are served on the ISP associated with the addresses
7 identified in the log attached to the complaint as Exhibit B. Once in possession of the
8 Doe defendants' identities, counsel attempts to obtain a settlement of the claims and
9 files amended complaints against any non-settling defendants. Service, additional
10 settlements, and defaults/default judgments follow, with the exception of a handful of
11 defendants who are actively litigating the cases in this district. On occasion, counsel
12 seeks an extension of time in which to serve.

13
14
15
16 Almost every filing in this cause of action was essentially copied from scores of
17 other cases filed by the same counsel.⁵ There is nothing wrong with utilizing form
18 documents to pursue identical infringement claims arising from identical activities. As
19 has been previously noted, however, it is wrong for ME2's counsel to file identical
20 complaints and motions with the Court and then expect the Court to believe that he
21 labored over each filing. LHF Prods., C16-1175RSM, Dkt. #73 at 12. To arrive at his
22 per Defendant fee request, counsel divided time entries related to specific activities by
23 the number of defendants then in the case. When the relatively small time allotments set
24
25
26

27
28 ⁵ The two exceptions were when plaintiff filed a status report and stipulated to the vacation of an order of default.

1 forth in counsel's declaration related to Bogert are multiplied by the number of
2 defendants, counsel is seeking compensation for an excessive number of hours. Counsel
3 apparently spent 7.2 hours studying the log of infringing transactions and IP addresses
4 that gave rise to this particular lawsuit.⁶ He spent another 7.2 hours generating a
5 complaint that is virtually identical to the complaints ME2 filed in other cases (not to
6 mention the scores of BitTorrent cases filed on behalf of other clients). Altering the
7 form complaint to initiate a new lawsuit is, at this point, a word processing chore: the
8 preparer checks to make sure the correct plaintiff and film are identified, changes the
9 number of Doe defendants in the caption, inserts the correct IP addresses in the section
10 of the complaint describing the defendants, and attaches the investigator's log regarding
11 the relevant swarm as Exhibit B. Charging 7.2 hours of attorney time for this task is
12 unreasonable. Counsel seeks to recover fees for another 6 hours spent preparing an
13 amended complaint that was identical to the original except for the caption and the
14 correlation of the IP addresses with the subscribers' names.

15
16
17
18
19 A form pleading and motions practice such as this simply does not take the type
20 of expertise or time that is normally associated with intellectual property matters. Nor
21 does it justify the number of cumulative hours that counsel seeks here. Having reviewed
22 the billing records and dockets in this and other similar matters, the Court finds that the
23 bulk of the "legal" work in these cases was performed and compensated years ago, that
24 these actions now involve far more word processing than drafting or legal analysis, and
25
26
27

28 ⁶ This case was originally filed against eighteen Doe defendants.

1 that the attorney time necessary to tailor documents to each case and/or individual is
2 minimal. The Court will award 1 hour, at an hourly rate of \$350, to compensate ME2
3 for counsel's time spent pursuing its claims against each named Defendant, and 1.3
4 hours, at an hourly rate of \$145.00, to compensate ME2 for legal assistant time altering
5 pleadings, motions, and service documents. The Court is satisfied that an attorneys' fee
6 of \$538.50 per Defendant is reasonable and sufficient to cover the form-pleading work
7 required by this case.
8

9
10 3. *Costs*

11 ME2 requests between \$142.00 and \$152.00 in costs from each Defendant,
12 depending on expenses related to service. Recovery of a pro rata portion of the filing fee
13 and the individual costs associated with the third-party subpoena and service is
14 appropriate.
15

16
17 **IV. CONCLUSION**

18 The Court, having reviewed the motions for default judgment and the remainder
19 of the record, finds adequate bases for default judgment. Accordingly, the Court hereby
20 finds and ORDERS:
21

- 22 1. ME2's motions for default judgment (Dkts. #81, #83, #84, #86, and #88) are
23 GRANTED IN PART and DENIED IN PART.
- 24 2. Defendants Bogert, Whalen, Revenko, Baluch, and Ordan are hereby
25 permanently enjoined infringing ME2's exclusive rights in the motion picture
26 film *Mechanic: Resurrection*, including without limitation by using the
27 Internet to reproduce or copy *Mechanic: Resurrection*, to distribute
28 *Mechanic: Resurrection*, or to make *Mechanic: Resurrection* available for
distribution to the public, except pursuant to lawful written license or with the
express authority of ME2;

3. To the extent any unauthorized reproduction or copy of *Mechanic: Resurrection* is in Defendants' possession or subject to their control, they are directed to destroy it;
4. Defendants are jointly and severally liable for statutory damages in the amount of \$750;
5. Defendant Dylan Bogert is individually liable for attorneys' fees in the amount of \$538.50 and costs in the amount of \$142.00.
6. Defendant Barbara Whelen is individually liable for attorneys' fees in the amount of \$538.50 and costs in the amount of \$152.00.
7. Defendant Nik Revenko is individually liable for attorneys' fees in the amount of \$538.50 and costs in the amount of \$152.00.
8. Defendant Murad Baluch is individually liable for attorneys' fees in the amount of \$538.50 and costs in the amount of \$142.00.
9. Defendant Joey Ordan is individually liable for attorneys' fees in the amount of \$538.50 and costs in the amount of \$142.00.

IT IS FURTHER ORDERED that the Clerk of the Court shall enter judgment in favor of plaintiff and against defendants for the amounts specified in this Order.

Dated this 12th day of October, 2018.



Robert S. Lasnik
United States District Judge